SUPREME COURT, U.S. LIBRARY

JUN 20 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1966~~ 1967

No. 272

EIKO UEHARA ROSE, *Petitioner*,

v.

ROBERT S. MCNAMARA, Secretary of Defense,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WARREN E. MAGEE,
HANS A. NATHAN,
1730 K. St., N.W.
Washington, D. C. 20006

WILLIAM H. QUASHA,
P.O. Box 3372
Manila, Philippines

Attorneys for Petitioner

Of Counsel:

HOWARD B. MCCLELLAN,
Naha, Okinawa

STUART H. ROBESON
and
ROGER E. BROOKS,
1828 Jefferson Place, N.W.
Washington, D. C.

Dated: June 20, 1967

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Petition For Writ of Certiorari	1
The Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions, Treaty and Statute Involved	3
Statement of the Case	6
Reasons for Granting the Writ	9
I. Petitioner's Conviction by the United States Civil Administration Court in the Ryukyuan Islands Is Unconstitutional and Void	11
(a) The United States Civil Administration Superior Court, Ryukyuan Islands, was unlawfully established	17
(b) C. A. Ordinance 144 is unconstitutional and void	22
(c) The GRI Court System is invalid	23
(d) C. A. Ordinance 144 could not be validly issued	25
(e) Even if President Eisenhower had power to legislate for the Ryukyuan Islands, USCAR Proclamation No. 8 establishing the U. S. Civil Administration Superior Court and the ordinances and laws with the violation of which petitioner was charged, are void in that there was an unlawful delegation of legislative power	28
II. Petitioner Was Entitled to the Protection of the Constitution, and Particularly Article III and the Fifth and Sixth Amendments Thereof	32

Page

A. The Constitution Applies to the United States Civil Administration Court 32

B. Petitioner Was Entitled to the Protection of the Fifth and Sixth Amendments 35

III. The Petit Jury Was Not Made Up Entirely of American Citizens as Required by Law 43

Conclusion 47

APPENDIX INDEX

Appendix 1a

Appendix "A"

Memorandum of District Court (March 18, 1966) 1a
Order, March 28, 1966, Oliver Gasch, J. 5a
Decision of U. S. Court of Appeals for the D. C. Circuit, decided March 23, 1967 ..... 6a

Appendix "B"

Decision of Judge Joseph C. McGarraghy of the U. S. District Court for the District of Columbia, in *Donna A. Nicholson, Petitioner* v. *Robert S. McNamara, Respondent,* Habeas Corpus No. 141-61, dated November 19, 1963 ..... 16a

Findings of Fact and Conclusions of Law Entered October 19, 1962 by Judge Charles F. McLaughlin of the U. S. District Court for the District of Columbia in *Ikeda* v. *McNamara,* Habeas Corpus No. 416-62 ..... 20a

United States Constitution, Section 1, Article II 22a

Appendix "C"

Treaty of Peace with Japan, Article 3 ..... 24a

Executive Order 10713 ..... 24a

Bill Number 60, Act Number 44 (Ryukyuan Islands), passed August 28, 1952 ..... 35a

Page

Civil Administration Ordinance No. 114, (U. S. Civil Administration of the Ryukyu Islands), 21 July 1953 ..... 39a

C. A. Ordinance No. 144, 16 March 1955 ..... 43a

Motion to Perpetuate Testimony 45a

Order (Judge Edward M. Curran), July 11, 1966 .... 47a

Exhibit 1—Count 1 of indictment of Eiko Uehara Rose 48a

TABLE OF CASES

Balzac v. *People of Puerto Rico*, 285 U.S. 298; 42 S. Ct. 343 (1922) 34
Callan v. *Wilson*, 127 U.S. 560; 3 S. Ct. 1201 (1888) .. 36
Carter v. *Carter Coal Co.*, 298 U.S. 238, 80 L. Ed. 1160; 56 S. Ct. 855 29
Franklin T.P. in Somerset County, N. J. v. *Tugwell*, 66 App. D.C. 42; 85 F. 2d 208 30
Grisham v. *Hagan*, 361 U.S. 278; 80 S. Ct. 310 (1960) .. 40
Hatchett v. *Federal Government*, 212 F. 2d 767 34
Hitt v. *McElroy*, Habeas Corpus No. 40-58 (US DC DC) 35
Ikeda v. *McNamara*, Habeas Corpus No. 416-62 (USDC, DC) 2, 15
Kinsella v. *Singleton*, 361 U.S. 234; 80 S. Ct. 297 (1960) 2, 15
Madsen v. *Kinsella*, 343 U.S. 341 (1952); 72 S. Ct. 699 39
McElroy v. *United States*, 361 U.S. 234; 80 S. Ct. 331 8, 16, 18, 38, 40
Nicholson v. *McNamara*, Habeas Corpus No. 141-61 (USDC DC) 2, 15
Powell v. *Zuckert*, No. 19,793, decided July 28, 1966 — U.S. App. D.C., 366 F. 2d 634 21
Pugh v. *U.S.*, 212 F. 2d 761 (C.A. 9, 1953) 34
Quirin, ex parte, 317 U.S. 1; 62 S. Ct. 2 (1942) 18
Reid v. *Covert*, 77 S. Ct. 1222; 354 U.S. 1 (1957) 13, 18, 34, 37, 41
Rose v. *McNamara*, 252 F. Supp. 111, 113 (1966) 34
Ross v. *McIntyre*, 140 U.S. 453; 11 S. Ct. 897 (1891) .. 39
Shachtman v. *Dulles*, 225 F. 2d 938 (CA DC, 1955) 24
Schechter, A. L. A., Poultry Corporation v. *United States*, 294 U.S. 495, 79 L. Ed. 1570, 55 S. Ct. 837 .. 29
Travis v. *United States*, 385 U.S. —; 87 S. Ct. 583, 17 L. Ed. 2d — 27

Page

U.S. v. *Curtiss-Wright Export Corp.* 299 U.S. 304; 57 S. Ct. 216 (1936) 33
U.S. v. Eaton, 144 U.S. 677; 12 S. Ct. 764 (1892) 25
U.S. v. *Laub,* 385 U.S. —; 87 S. Ct. 548, 17 L. Ed. 2d (1967) 26
U.S. v. *Mason,* 344 F. 2d 673 (1965) 41
U.S. v. *Sharpnack,* 355 U.S. 297; 78 S. Ct. 291 (1958) 20, 21
U.S. v. *Standard Brewery,* 251 U.S. 210; 40 S. Ct. 139 .. 25
Van Brocklin v. *Anderson,* 117 U.S. 151 6 S. Ct. 670 (1886) 24
Viereck v. *United States,* 318 U.S. 236; 60 S. Ct. 561 .. 26
White, ex parte, 66 F. Supp. 982 (D. C. Hawaii, 1944) 44
Youngstown Sheet & Tube Co. v. *Sawyer,* 343 U.S. 579, 72 S. Ct. 863 (1952) 20

STATUTES

U.S.C., Title 28, Sec. 1254(1) 2
Sec. 1861 5
Title 18, Sec. 3231 ..... 24a

CONSTITUTION

Article III, Sec. 1 4
Sec. 2 3

Fifth Amendment 4

Sixth Amendment 4

MISCELLANEOUS

Executive Order No. 10713 ..... 24a

Treaty of Peace, Article 3 ..... 24a

Civil Administration Ordinance No. 144 ..... 43a

Bill of the Ryukyuan Government, No. 60, Act. No. 44 35a

Civil Administration Ordinance No. 114 ..... 39a

USCAR, Proclamation No. 8 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

EIKO UEHARA ROSE, *Petitioner*,

v.

ROBERT S. MCNAMARA, Secretary of Defense,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Eiko Uehara Rose, an American citizen, prays that a Writ of Certiorari issue to review the erroneous decision and judgment of the United States Court of Appeals for the District of Columbia Circuit entered on March 23, 1967.

THE OPINIONS BELOW

The Memorandum Opinion of the United States District Court for the District of Columbia is printed in Appendix[1] "A", infra, at p. 1a and is reported in

[1] Hereinafter sometimes referred to as App.

252 F. Supp. 111 (1966). The Opinion of the United States Court of Appeals for the District of Columbia Circuit is printed in Appendix "A" infra, at p. 6a and has not been reported. The opinion of the United States District Court for the District of Columbia in *Nicholson* v. *McNamara,* involving the constitutionality of the Ryukyuan Island court deriving its authority from the President entitled "The United States Civil Administration Court, Ryukyuan Islands", in *Nicholson* v. *McNamara,* is printed in Appendix "B", infra, at p. 16a. This opinion has not been reported. The opinion in the similar case of *Ikeda* v. *McNamara,* also involving the constitutionality of the Ryukyuan Island court, is printed in Appendix "B", infra, at p. 20a. This opinion has not been reported.

JURISDICTION

The Court of Appeals below filed its Opinion and Judgment on March 23, 1967. The jurisdiction of this Court is invoked under Title 28, U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the Petitioner, a United States citizen, was deprived of her constitutional rights to be tried by a Constitutional court created under Article III of the Constitution of the United States.

2. Whether Petitioner was denied her constitutional right to be tried by a Federal jury of her peers, that is, citizens of the United States, as required by the Congress of the United States.

3. Whether the United States Civil Administration Court for the Ryukyuan Islands was lawfully established and whether Civil Administration Ordinance No. 144 and the so-called Ryukyuan Income

Tax Law, established under delegated Executive authority, are constitutional, and whether Petitioner can be found guilty of a crime for the alleged violation of a military ordinance and a so-called Ryukyuan Act based solely upon a delegation of Executive power under Executive Order No. 10713, as amended, absent an Act of Congress declaring such conduct of an American citizen to be criminal and absent Congressional imposition of criminal penalties.

4. Whether Petitioner's constitutional right to an indictment by a Federal grand jury of her peers, to a trial by a jury of her peers, to a trial in a court created under Article III of the Constitution of the United States and/or by an Act of Congress has been violated by the conduct of the servants and agents of the Secretary of Defense, purportedly acting on behalf of the President, pursuant to delegation of authority in Executive Order No. 10713, as amended.

CONSTITUTIONAL PROVISIONS, TREATY AND STATUTE INVOLVED

Article III, Section 2, in its applicable part, of the United States Constitution provides:

> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . ."

Article III, Section 1 of the Constitution provides, in part:

> "Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges,

both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

The Fifth Amendment of the Constitution of the United States provides:

"AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment of the Constitution of the United States provides:

"AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

On January 28, 1952, Japan entered into a Treaty of Peace with the United States. Article 3 of the Treaty, applicable here, reads as follows:

> "Japan will concur in any proposal of the United States to the United Nations to place under its trusteeship system, with the United States as the sole administering authority, Nansei Shoto south of 29° north latitude (including the Ryukyu Islands and the Daito Islands). . . . Pending the making of such a proposal and affirmative action thereon, the United States will have the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands, including their territorial waters." (App. "C", infra, p. 24a)

No statute of the United States is involved creating the crime and imposing criminal penalties for which the Petitioner was erroneously convicted below or creating the United States Civil Administration Court.

28 U.S.C.A., Sec. 1861, reads as follows:

QUALIFICATIONS OF FEDERAL JURORS

Any citizen of the United States who has attained the age of twenty-one years and who has resided for a period of one year within the judicial district, is competent to serve as a grand or petit juror unless—

> (1) He has been convicted in a State or Federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.
>
> (2) He is unable to read, write, speak, and understand the English language.

(3) He is incapable, by reason of mental or physical infirmities to render efficient jury service.

June 25, 1948, c. 646, 62 Stat. 951; Sept. 9, 1957; Pub. L. 85-315, Part V, § 152, 71 Stat. 638.

The Military Ordinance, Civil Administration Ordinance No. 144, and the so-called Bill of the Ryukyuan Government, Act No. 44, dated 12 October, 1952, are printed in the Appendix "C", infra, p. 43a and p. 35a.

STATEMENT OF THE CASE

Petitioner, an American citizen residing on the Island of Okinawa in the Ryukyuan Islands, was convicted of an alleged "violation of Section 2.2.29 of C.A. Ordinance No. 144", for evasion of income taxes imposed by a military ordinance entitled "Ordinance No. 114", dated July 21, 1953, issued by the Deputy Governor, Charles V. Bromley, Brigadier General of the United States Army. Ordinance No. 114 is printed in the Appendix "C", infra, p. 39a.

The alleged indictment in the name of the United States of America reads as follows:

Count 1. Violation of Section 2.2.29 of CA Ordinance No. 144.

In that EIKO UEHARA ROSE, being then the owner and recipient of taxable income derived from the operation of the Tea House August Moon, also known as the Tea House Matsunoshita, did, at Okinawa, Ryukyu Islands, on or about 5 September 1962 attempt to evade payment of income taxes in the total amount of about $70,000 lawfully due the Government of the Ryukyu Islands on taxable income derived by her from operations of the Tea House August Moon during the period from about 1 July 1957 to about 30 June 1962, in violation of

> Article 87 of Government of the Ryukyu Islands Act No. 44, dated 12 October 1952, "Income Tax Law," as amended and supplemented by Civil Administration Ordinance No. 114, dated 21 July 1953, "Ryukyuan Income Taxes," by wilfully, wrongfully, and unlawfully filing with the Government of the Ryukyu Islands false and fraudulent income tax returns for the period 1 July 1957 to 30 June 1962, from which substantial amounts of taxable income actually derived by her from operations of the Tea House August Moon, during the period covered by the said returns, were deliberately omitted by the said EIKO UEHARA ROSE. —(Appendix "C", infra, 48a)

Congress has never levied or imposed any income taxes on any American citizens in the Ryukyuan Islands and has never made the failure to pay any such taxes a crime against the United States.

Petitioner was tried in the United States Civil Administration Court for the Ryukyuan Islands, created by a delegation of Executive authority from the President of the United States, purportedly under Executive Order No. 10713, printed in the Appendix "C", infra, p. 24a.

Petitioner exhausted her rights in Okinawa. On appeal to the Court of Appeals of the United States Civil Administration Court for the Ryukyuan Islands, which is composed of the Judges who try the cases in the first instance, which appellate court was also created under a delegation of authority under Executive Order No. 10713, as amended, Petitioner's illegal conviction was affirmed.

Petitioner filed a complaint in the United States District Court for the District of Columbia, seeking

a declaratory judgment determining that her conviction was a nullity and in violation of her constitutional rights to be tried only in a court created under Article III of the Constitution of the United States or, at the very least, in a court created by the Congress of the United States in Okinawa, (which was transferred to the United States by Japan in the Treaty of Peace following the end of World War II in the Pacific) and only after indictment and trial by a jury of her peers, i.e. American citizens.

The Secretary of Defense filed a Motion for Summary Judgment. Petitioner filed a Motion for Summary Judgment. The District Court granted Respondent McNamara's Motion for Summary Judgment, denied Petitioner's Motion for Summary Judgment, and dismissed Petitioner's complaint.

Petitioner appealed to the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals affirmed, on the ground Petitioner's conviction was lawful because it was based on "the extensive power of the President," to set up special tribunals in "occupied foreign lands" to try American citizens for crimes, created under the President's power through a delegation of power in a court created also under the President's power, does not violate the constitutional rights of Petitioner under Article III and the Fifth and Sixth Amendments to the Constitution of the United States "under the special circumstances of our relationship to Okinawa" and under the "Treaty of Peace" with Japan, citing *Madsen* v. *Kinsella,* 343 U.S. 341 (1952).

This petition for a Writ of Certiorari has been timely filed, seeking a review of the erroneous decision of

the Court below, in order to protect Petitioner's constitutional rights and to have the important Constitutional questions involved determined by this Court.

REASONS FOR GRANTING THE WRIT

Several of the reasons and considerations governing review on Certiorari by this Court are present in this case.

The Court below has rendered a decision in conflict with the decisions of this Court and in conflict with earlier decisions of the Court below and has decided important constitutional questions upholding the right of the Executive Department to try American citizens in Okinawa, which has been transferred to the United States by the Treaty of Peace with Japan, which is no longer occupied, as peace came in 1952, in courts created by the Executive Department without Congressional authority, presided over by employees of the Executive Department who admittedly are not either Title III or legislative judges, for a crime created by military ordinances issued by the Defense Department, involving an indictment by a grand jury and a trial by a petit jury which were not composed entirely of American citizens, contrary to the provisions of Article III and the Fifth and Sixth Amendments to the Constitution of the United States and Title 28, U.S.C.A., Sec. 1861, requiring that Federal jurors be citizens of the United States.

Petitioner, a citizen of the United States, was denied an indictment and trial by juries of her peers, i.e., United States citizens—as required by Congress, six of the petty jurors being foreigners, the presiding Judge was not appointed by the President nor confirmed by

the Senate, but was an Army employee, as were the appellate Judges, who at times also sat as Trial Judges in the United States Civil Administration Court.[2] Such a court and such juries do not meet the constitutional requirements of Article III, the Fifth and Sixth Amendments to the Constitution and 28 U.S.C.A., Sec. 1861. Certainly the USCAR Judges are not independent Judges and certainly are not Article III Judges or in any sense legislative Judges. They are not authorized by law or by assignment to preside over felony trials in any United States Court involving an American citizen.

Also involved is the question, which should be decided by this Court, whether, assuming the President has power as Commander-in-Chief to declare acts of American citizens to be crimes, can the President delegate this power to others; has he delegated it to others; and can those persons, officers and employees of the United States Army, levy and impose taxes and declare the failure by an American citizen to pay such taxes to be criminal; and to prosecute the citizen in the USCAR Court under Executive Order No. 10713, as amended, without the protection of Article III, the Fifth and Sixth Amendments to the Constitution and 28 U.S.C.A. Sec. 1861.

The grave Constitutional questions here involved have been decided erroneously and in conflict with the applicable decisions of this Court.

---

[2] Hereinafter sometimes referred to as "USCAR".

I. PETITIONER'S CONVICTION BY THE UNITED STATES CIVIL ADMINISTRATION COURT IN THE RYUKYUAN ISLANDS IS UNCONSTITUTIONAL AND VOID

Respondent's position below was that Petitioner had been convicted for the evasion of "Ryukyuan Islands income tax". The so-called "Government of the Ryukyuan Islands" is but a creature of the High Commissioner, a United States General, created under Executive Order No. 10713. Congress has never levied or imposed taxes on anyone in the Ryukyuan Islands. Bill No. 60, Act No. 44, passed August 28, 1952, purportedly enacted by the legislature of the Government of the Ryukyuan Islands is, for all intents and purposes, a military ordinance. This is clear from a reading of the "law" and Civil Administration Ordinance No. 144 dated July 21, 1953, issued by the Deputy Governor, Charles V. Bromley, Brigadier General of the United States Army (App., *infra,* p. 43a).

On April 28, 1952, Japan entered into a treaty terminating hostilities and bringing peace between the United States and Japan. Under Article 3 of this Treaty, the United States was given all powers of administration, legislation, and jurisdiction over the Ryukyuan Islands.

The system of government for the Ryukyuan Islands has its source in Executive Order No. 10713. The High Commissioner, a General in the United States Army, has control of all criminal proceedings in the Ryukyuan Islands. Petitioner, a United States citizen, was not tried in any court created under Article III of the Constitution and the USCAR court was not created by any Act of Congress. The Judges sitting in the USCAR courts are not appointed by the President nor confirmed by the Senate; are not legislative judges

(that is, judges functioning under an Act of Congress), but are appointed under the High Commissioner, a United States Army officer and serve both in the trial court and in the appellate court in the Islands. Petitioner is not a member of the Armed Forces and is not subject to trial under military law.

The Courts below held that the President has power over the Ryukyuan Islands seized during the war and this power continues even after the peace treaty was signed, notwithstanding that the islands were transferred by Japan to the United States for all administrative, legislative and jurisdictional purposes and the President can delegate to others the creation of a court system, the appointemnt of "judges" thereto, i.e., military personnel or civilians in the employ of the Department of Defense, and can indict and try American citizens for violations of so-called laws enacted under Executive Order No. 10713, not promulgated by the President directly, as crimes created by delegated authority from the President to military personnel in the Islands. Nowhere in Executive Order No. 10713 is any crime defined nor is any tax levied. The evasion of taxes is not stated by the President to be a crime.

We submit that the President (now that peace has come, a treaty has been signed and Japan has vested in the United States [not in the President] all powers of administration, legislation and jurisdiction over the Islands), has no power as Commander-in-Chief of the military forces to try American citizens for evasion of taxes levied by military personnel and for criminal tax evasion, also created by military personnel, in a USCAR Court, also created under delegated authority purportedly contained in Executive Order No. 10713.

The argument of Respondent and the Courts below that Petitioner was afforded every protection of the Bill of Rights because she was afforded an indictment by grand jury and a trial by a petty jury *not* composed entirely of United States citizens, is unsound.

Respondent's contentions and the decision below that *Reid* v. *Covert,* 354 U.S. 1; 77 S. Ct. 1222, 1 L. Ed. 2d 1148, does not confer on United States citizens abroad the right in felony cases to be tried in a Federal court established by Congress pursuant to Article III and with all the protections of the Bill of Rights are unsound.

The holding below that Article III does not cover alleged crimes committed by American citizens in Okinawa, on the erroneous theory that the evasion of Ryukyuan income taxes does not involve the United States, is specious and unsound.

All authority of the so-called "Ryukyuan Government" is derived from Executive Order No. 10713. The indictment is in no sense an indictment brought on behalf of the "Government of the Ryukyuan Islands". The indictment is in the name of "*The United States of America*" and charges a violation of Military Ordinances numbered C.A. 144 and C.A. 114.

The indictment on which Petitioner was convicted, and the only "charge" before this Court is a "violation of Section 2.2.29 of C.A. Ordinance No. 144". The "Government of the Ryukyuan Islands" is but an agency of the United States created under Executive Order No. 10713. The plaintiff in Okinawa, in name and in fact is "*The United States of America.*" (App. "C", infra, p. 48a).

We submit that there can be no such thing as a "local income tax" in the Ryukyuan Islands, as all such taxes are enforced by C.A. Ordinance No. 144, a military edict of the United States Army.

The decision below holds that the President has power to delegate to others the levying of taxes and the creating of crimes in the Ryukyuan Islands and to provide for the punishment of American citizens for such "crimes" in a court of a military nature created under the authority of the President under Executive Order No. 10713 on the erroneous premise that Okinawa is occupied enemy territory.

The fact that Congress is familiar with the courts in the Ryukyuan Islands in no sense dispenses with the constitutional provision requiring that American citizens be tried for felonies in an Article III court created pursuant to constitutional authority, since the Ryukyuan Islands are now under the legislative and administrative control of the United States, not the President.

We submit that *Reid* v. *Covert, supra,* and the cases following it hold that the Constitution of the United States protects American citizens and that when the United States *in time of peace* undertakes to try an American citizen for a felony, such trial has to be conducted in a court created by Congress under Article III and under the Fifth and Sixth Amendments to the Constitution.

The question of whether an American citizen is entitled to the protection of Article III and the Fifth and Sixth Amendments to the Constitution when tried for a felony in the Ryukyuan Islands has been before the United States District Court for the District of

Columbia on several other occasions. This question was before that Court in *Nicholson* v. *McNamara,* Habeas Corpus No. 141-61. In *Nicholson,* a Petition for Writ of Habeas Corpus was later amended to a Complaint for Declaratory Relief, in which Nicholson sought an adjudication that her conviction for a felony in a USCAR Court was contrary to the provisions of Article III and the Fifth and Sixth Amendments to the Constitution and violated her constitutional rights. In *Nicholson,* charge sheets were involved and no indictment or trial by petit jury was afforded. The District Court, speaking through Judge Joseph C. McGarraghy, held that "the confinement of Mrs. Nicholson pursuant to an Information charging her with a capital offense and her subsequent trial and conviction by a court without a jury, was a violation under her rights under Article III, Section 2, Clause 3, and the Fifth and Sixth Amendments to the Constitution". The decision of Judge McGarraghy in *Nicholson* has not been reported; hence it is printed verbatim in the Appendix "B" infra, p. 16a. Respondent McNamara in *Nicholson* appealed from the final judgment in Nicholson's favor, but this appeal was dismissed in April of 1964, by stipulation between the parties, pursuant to Rule 73(a), F.R.C.P.

On October 19, 1962, the District Court, through Charles F. McLaughlin, Judge, entered Findings of Fact and Conclusions of Law in *Ikeda* v. *McNamara,* Habeas Corpus No. 416-62. In *Ikeda,* the District Court held there was no provision in the Executive Order nor any rules of regulations issued thereunder which comply with Article III, Sec. 2, Clause 3, and with the Fifth and Sixth Amendments. Hence, the detention of the petitioner contravened Article III,

Sec. 2, Clause 3 of the Constitution and the Fifth and Sixth Amendments, and an Order was entered discharging the petitioner from McNamara's custody. No appeal was taken by McNamara from the decision of Judge McLaughlin in *Ikeda*. The Findings of Fact and Conclusions of Law of Judge McLaughlin have not been reported, hence they are printed verbatim in the Appendix "B" infra, p. 20a.

The decision below in our case upholds the conviction on the theory that the affording of an indictment and a jury trial (by foreigner jurors) of the Petitioner meets all the requirements of Article III of the Constitution and the Fifth and Sixth Amendments to the Constitution.

The decision below points out that, after *Nicholson* and *Ikeda* in 1963 by military ordinance, a grand jury indictment and petit jury trial were assured to defendants in Civil Administration courts. The decision below recognizes the validity of the *Nicholson* and *Ikeda* holdings in footnote 4, (App. "A", infra, p. 10a), but argues, quoting from Judge Gasch's Memorandum Opinion, that, "the record in no way reflects a denial of constitutional rights resulting from the operation of the courts of the Ryukyuan Islands. 252 F. Supp. 111, 113 (D.C.D.C., 1966)." The decision below and Judge Gasch's decision actually are bottomed on the premise that the power of the President to set up tribunals in *occupied foreign lands* and to try American citizens for crimes in those tribunals, authorized the trial of Petitioner in the USCAR Court, not created by Congress, but created under delegated authority of the President, relying on *Madsen* v. *Kinsella,* 343 U.S. 341 (1952), and that this power of the

President to so try American citizens survives the Treaty of Peace and continues today, even though we know that Okinawa is not "occupied foreign lands", but has been transferred to the United States for administrative, legislative and jurisdictional purposes.

(a) The United States Civil Administration Superior Court Ryukyuan Islands, was unlawfully established

The authority for establishing the USCAR Court was Proclamation No. 8 of General Donald P. Booth, under Section 10 of the Executive Order No. 10,713. Section 10 of the Executive Order No. 10,713 provided that judicial powers in the Ryukyuan Islands were to be exercised by two systems of courts—Ryukyuan courts and United States courts.

We submit President Eisenhower did not have authority to issue the Executive Order establishing these courts. Sections 1 and 2 of the Executive Order No. 10,713 provide that all administrative, *legislative* and judicial powers reposed in the United States concerning the Ryukyuan Islands shall be exercised by the Secretary of Defense, subject to the direction and control of the President. These basic and broad powers are stated to have been reposed in the United States by Article 3 of the Treaty of Peace with Japan.

The President, in Executive Order No. 10,713, declares by virtue of (1) this Treaty between Japan and the United States; (2) the Constitution of the United States; (3) his office as President of the United States, and (4) by his position as Commander-in-Chief of the Armed Forces, these extraordinary powers REPOSED in the UNITED STATES [not in the *President* of the United

States] by the Treaty, are now delegated to the Secretary of Defense [and from there to General Booth].

> "Congress and the President, like the Courts, possess no power not derived from the Constitution."
>
> —*Ex Parte Quirin,* 317 U.S. 1, 62 S. Ct. 2 (1942) at 25, 10.
>
> "In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined."
>
> —*Reid* v. *Covert,* 77 S. Ct. 1222, at p. 1230 (354 U.S. 1 (1957))

The President has no legislative power to be delegated to the Secretary of Defense (and from him to General Booth) to establish the U.S. Civil Administration Superior Court under the Constitution or because of the Treaty with Japan. And, in spite of the reference in the Executive Order to this authority as Commander-in-Chief of the Armed Forces, this office, in time of peace, cannot be used as a source of authority to legislate or to assume powers that are not the President's.

We read *Madsen* v. *Kinsella,* 343 U.S. 341, 72 S. Ct. 699 (1952), differently than the courts below. *Madsen* presented the question whether the United States Court of the Allied High Commission for Germany had jurisdiction, in 1950, to try a civilian citizen of the United States. The Court was appointed by the Military Governor of the U.S. Area of Control. His authority also stemmed from the President. The opinion ex-

plores the history of U.S. Military Commissions and Occupation Courts, stressing their flexibility; yet this Court held:

> "In the absence of attempts by Congress to limit the President's power, it appears that, as Commander-in-Chief of the Army and Navy of the United States, *he may, in time of war,* establish and prescribe the jurisdiction and procedure of Military Commissions, and of Tribunals in the nature of such commissions, *in territory occupied* by Armed Forces of the United States. His authority to do this *sometimes survives* cessation of hostilities."
>
> —at pp. 348, 703 (Emphasis supplied.)

Here, the peace treaty was signed in 1952 and peace has come. *Madsen* is inapposite. In *Reid* v. *Covert, supra,* Justice Black further clarified *Madsen:*

> "[Madsen] concerned trials in enemy territory which had been conquered and *held by force of arms* and which was being *governed at the time by our military forces.* In such areas the army commander can establish military or civilian commissions as an arm of the *occupation* to try everyone in the occupied area, whether they are connected with the army or not."
>
> —Note 63, 354 U.S. 1, 77 S. Ct. 1240 (Emphasis supplied.)

But *Madsen* clearly took place under Occupation law, before a Treaty of Peace was signed. Okinawa is not "occupied." True, the Army is present there, as it is in the United States. But, as Mr. Justice Jackson said in his concurring opinion in *Youngstown Sheet & Tube Co.* v. *Sawyer:*

> "Congress, fulfilling that function, has authorized the President to use the army to enforce cer-

tain civil rights. On the other hand, Congress has forbidden him to use the army for the purpose of executing general laws except when *expressly* authorized by the Constitution or by Act of Congress.

* * * * * * *

"No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role. What the power of command may include I do not try to envision, but I think it is not a military prerogative, without support of law, to seize persons or property because they are important or even essential for the military and naval establishment."

—343 U.S. 579, 72 S. Ct. 863, at 875 (1952)

In *United States* v. *Sharpnack*, 355 U.S. 297, 78 S. Ct. 291 (1958), this Court upheld the power of *Congress* to:

". . . delegate to local legislative bodies broad jurisdiction over Territories and ceded areas provided Congress retains, as it does here, ample power to revise, alter and revoke the local legislation."

In our case, *Congress* has *not acted* at all, and has delegated neither to the President nor to the High Commissioner, nor to the GRI Government, the power to establish the U.S. Civil Administration Superior Court by either Executive Order, *USCAR* Ordinance, or GRI law.

Justices Black and Douglas in their dissenting opinion (according to which even Congress did not have such power of delegation), pointed this out:

"There are two provisions of the Constitution involved in the present controversy. Article I,

Sec. 1 provides: 'All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.' A supplementary provision is that contained in Art. IV, Sec. 3, cl. 2: 'The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *.'

"*It is, therefore, the Congress, and the Congress alone, that has the power to make rules governing federal enclaves. I suppose there would be no doubt, at least after Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153, that this rule-making power could not be exercised by the President, let alone some federal agency such as the Department of the Interior.* The power to make laws under which men are punished for crimes calls for as serious a deliberation as the fashioning of rules for the seizure of the industrial plants involved in the Youngstown case. Both call for the exercise of legislative judgment; and I do not see how that requirement can be satisfied by delegating the authority to the President, the Department of the Interior, or, as in this case, to the States."

—*U.S.* v. *Sharpnack, supra,* at p. 298. (Emphasis supplied.)

The latest pronouncement by the Court below following *Reid* v. *Covert, supra,* supporting our contention that the Japanese Treaty does not confer power on the President in Okinawa to act freely from the constraints of the Constitution, is *Powell* v. *Zuckert,* Appeal No. 19,793, decided July 28, 1966, ... U.S. App. D.C. ..., 366 F. 2d 634. In *Powell* the Court below held:

"The Government's position is that the search was made lawful by paragraph 6(a), Article

XVII, Agreement under Article VI of the Treaty of Mutual Cooperation and Security, 11 U.S.T. 1665, which provides:

> 'The military authorities of the United States and the authorities of Japan shall assist each other in the carrying out of all necessary investigations into offenses, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offense.'
>
> "This, appellee contends, made lawful the presence of Air Force agents 'as observers during the execution of a valid Japanese search warrant for appellant's off-base residence.' The obvious and decisive answer, of course, is that no agreement with a foreign nation can confer power on the Congress, or any other branch of Government, which is free from the restraints of the Constitution."
>
> —at p. 640

The decision below conflicts with *Powell*. We submit *Powell* is correct and the decision below is incorrect.

Thus, it is plain both Executive Order No. 10713 and USCAR Proclamation No. 8 by which the U.S. Civil Administration Superior Court was established, are unconstitutional and void.

(b) C. A. Ordinance 144 is unconstitutional and void

What we have shown about the lack of power of the President to legislate by Executive Order in order to establish the U.S. Civil Administration Superior Court applies to the purported enactment of USCAR Ordinances and GRI laws. For, all of the power and all of the authority, purportedly exercised by the High

Commissioner, the appellee's agent, in promulgating these "laws" and "ordinances" are based on Executive Order No. 10,713.

Section 1 of this Executive Order plainly states that all administrative, legislative and jurisdictional power shall be exercised in accordance with the Order.

Section 2 immediately delegates these powers to the Secretary of Defense, subject to the direction and control of the President.

Section 4 establishes the Civil Administration and the High Commissioner (General Booth), and Section 5 "continues" (but under certain limitations imposed by the Executive Order), the now existing Ryukyuan Central Government.

It is from Sections 6 and 7 of the Executive Order that the entire legislative "power" of the Government of the Ryukyuan Islands flows.

(c) The GRI Court System is invalid

Again, the President by this Order, has attempted to exercise powers which, according to the Constitution, he does not have. For, not only has he tried to authorize others to pass laws to be observed by all inhabitants, permanent or temporary, of the Ryukyuan Islands, and caused courts to be created to enforce them, but he has, in fact, abdicated and delegated power which only Congress has, all without Congressional authority.

> "But public and unoccupied lands, to which the United States have acquired title, either by deeds of cession from other states, *or by treaty* with a foreign country, *Congress,* under the power conferred upon it by the Constitution, 'to dispose of

> and make all needful rules and regulations respecting the territory or other property of the United States,' *has the exclusive right to control* and dispose of, as it has with regard to other property of the United States; and no state can interfere with this right, or embarrass its exercise. U.S. v. Gratiot, 14 Pet. 526; Poilard v. Hagan, 3 How. 224; Irvine v. Marshall, 20 How. 558, 563; Gibson v. Chouteau, above cited." (Emphasis supplied)
>
> —*Van Brocklin* v. *Anderson,* 117 U.S. 151, 6 S. Ct. 670, 679 (1886).

The argument that the establishment of this Ryukyuan Court was inherent in the President's power to conduct foreign affairs is unavailing and the court below in 1955 held:

> ". . . this is so notwithstanding the relation of the subject to *the Executive's power over the conduct of foreign affairs,* for it too, *'like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.' United States* v. *Curtiss-Wright Export Corp.,* 229 U.S. 304, 320, 57 S. Ct. 216, 221, 81 L. Ed. 255; *Bauer* v. *Acheson,* (D.C.D.C.), 106 F. Supp. 445, 451."
>
> —*Shachtman* v. *Dulles,* 96 U.S. App. D.C. 287, 225 F. 2d 938, 940 (C.A.D.C. 1955). (Emphasis supplied.)

Thus, C.A. Ordinance 144 is, in fact, born solely of this unlawful attempted treble delegation by the President of alleged "powers" which the President himself does not possess under the Constitution of the United States and, therefore, could not delegate.

(d) C.A. Ordinance 144 could not be validly issued

Assuming (without conceding) that Executive Order No. 10,713 is valid, the High Commissioner still had no power to issue or maintain in force ordinances which declared certain acts or omissions to be crimes. The delegation to a regulatory or Executive Agency (as the Defense Department) of the power to declare acts or omissions as criminal conduct has been struck down again and again. As early as 1893, in *United States* v. *Eaton,* 144 U.S. 677, 12 S. Ct. 764 (1892), this Court said:

> "It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense . . . Regulations prescribed by the president and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them, and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."
>
> —at p. 767.

In 1920, this Court in *United States* v. *Standard Brewery,* 251 U.S. 210, 40 S. Ct. 139, held:

> "Administrative rulings cannot add to the terms of an act of Congress and make conduct criminal which such laws leave untouched."
>
> —at p. 140.

And, inasmuch as the U.S. Civil Administration Superior Court is a court established by Federal au-

thority, the language of this Court in *Viereck* v. *United States,* 318 U.S. 236, 60 S. Ct. 561, is apposite:

> "One may be subjected to punishment for crime in the *federal* courts only for the commission or omission of an act defined by statute, or by regulation having legislative authority, and then *only if punishment is authorized by Congress.*" (Emphasis supplied.)
>
> —at p. 563.

In *United States* v. *Laub,* 385 U.S. . . . ; 87 S. Ct. 574, 17 L. Ed. 2d . . . (1967), Laub and others were indicted under 18 U.S.C., Sec. 371 for conspiring to violate 8 U.S.C., Sec. 1185, the conspiracy consisting of recruiting and arranging the travel to Cuba of 58 American citizens, whose passports, although otherwise valid, were not specifically validated for travel in Cuba. 18 U.S.C., Sec. 1185 (Sec. 215(b) of the Immigration and Nationality Act of 1952) made it unlawful for any citizen of the United States to depart from, or enter, or attempt to depart from, or enter the United States unless he bears a valid passport during a war or during a national emergency proclaimed by the President. President Truman proclaimed an emergency and travel was restricted to Cuba. The Department of State issued a notice that passports shall not be valid for travel to, or in Cuba unless specifically endorsed for such travel under the authority of the Secretary of State. The Department of State contended that travel in violation of this area restriction is unlawful, and this was the basis for the indictment. The District Court dismissed the indictment because the statute did not make criminal forbidden travel in Cuba. This Court affirmed, rejecting the Government's contention that the statute is broad enough to

encompass departures for geologically restricted areas and a violation of such travel restrictions was a criminal offense under the statute. In affirming the District Court, this Court held:

> "We begin with the fact, conceded by the Government, that "Section 215 (b) does not, in so many words, prohibit violations of area restrictions; it speaks, as the district court noted in the *Laub* case * * * in the language of 'border control statutes regulating departure from and entry into the United States.'" Brief for the United States, p. 11. Nevertheless, the Government requests us to sustain this criminal prosecution and reverse the District Court on the ground that somehow, the text is broad enough to encompass departures for geographically restricted areas * * *." Ibid. We conclude, however, that in this criminal proceeding, the statute cannot be applied in this fashion."
>
> —at pp. 577-578.

In the companion case of *Travis* v. *United States*, 385 U.S. . . . ; 87 S. Ct. 583, 17 L. Ed. 2d . . . , this Court followed *Laub* and reversed a conviction, which had been affirmed on appeal, involving forbidden travel to Cuba. As Congress had not made travel to Cuba criminal, the regulations and efforts of the Executive Department to make restricted travel punishable criminally were struck down by this Court. In following *Laub*, this Court held:

> "As our decision in *Laub* determines, if petitioner in fact had a valid passport, and the gravaman of the Government's accusation under § 215 (b) were that her passport was not valid for travel to Cuba, this conviction could not stand. We have today held that area restrictions upon the use of

> an otherwise valid passport are not criminally enforceable under § 215(b). Because the Government did not allege, and introduced no proof, that petitioner did not bear a valid passport on each of the occasions on 'which she departed for Cuba, via Mexico, our decision in *Laub,* supra, requires that her conviction be reversed."
>
> —at pp. 583-584).

It is respectfully submitted that the Military Ordinances with the violation of which Petitioner was criminally charged, are unconstitutional and void because they were issued by agencies that—under the Constitution—had no power or authority to promulgate them, and they certainly lacked power to impose *criminal* penalties.

(e) Even if President Eisenhower had power to legislate for the Ryukyuan Islands, USCAR Proclamation No. 8 establishing the U. S. Civil Administration Superior Court and the ordinances and laws with the violation of which petitioner was charged, are void in that there was an unlawful delegation of legislative power

Assuming (without conceding) that somewhere in the Constitution authority could be found under which President Eisenhower could have exercised legislative power over the Ryukyuan Islands, the President nevertheless would not be permitted to abdicate or to transfer to others such legislative functions. Executive Order No. 10,713 delegates authority to others, including the High Commissioner of the Ryukyuan Islands and certain bodies or agencies created under the Executive Order to legislate for the Ryukyuan Islands. The Executive Order delegates to others the power to establish systems of courts in the Ryukyuan Islands. The Executive Order, however, does not define or pre-

scribe what violations are to be considered criminal and does not provide for the punishment of such violations.

In order for a delegation of legislative power to be valid, the enabling act must prescribe and define controlling standards, because legislative power cannot be abdicated. In *A.L.A. Schechter Poultry Corporation* v. *United States,* 294 U.S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, a live poultry code promulgated under Section 3 of the National Industrial Recovery Act was held invalid, notwithstanding that this section authorized the President to approve the code of fair competition, which he did by Executive Order. The Code provided for punishment for violators of the rules of the Code. Several corporations and individuals were indicted for violating this Code of Fair Competition, and were convicted. The convictions were affirmed on appeal. In reversing these convictions, this Court held that the statute in question and the actions of the President thereunder were invalid. They were held to be illegal attempts to exercise illegally delegated legislative power.

In *Carter* v. *Carter Coal Co.,* 298 U.S. 238, 80 L. Ed. 1160, 56 S.C. 855, the Supreme Court reversed certain convictions under the Bituminous Coal Conservation Act of 1935, which delegated the power to others to fix maximum hours of labor of miners, together with the power to fix minimum wages. In holding these attempted delegations of power by Congress invalid, this Court said:

> "The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delega-

tion to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. * * * The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment that it is unnecessary to do more than refer to decisions of this court which foreclose the question. Schechter Poultry Corp. v. United States, 295 U.S. 495, at page 537, 55 S. Ct. 837, 79 L. Ed. 1570, 97 A.L.R. 947; Burbank v. Richmond, 226 U.S. 137, 143, 33 S. Ct. 76, 57 L. Ed. 156, 42 L.R.A. (N.S.) 1123; Washington ex rel. Seattle Trust Co. v. Roberge, 278 U.S. 116, 121, 122, 49 S. Ct. 50, 73 L. Ed. 210, 86 A.L.R. 654."

—at p. 873.

The decision below conflicts with another holding of the court below, that portions of the Emergency Relief Appropriation Act of 1935 were unlawful delegations of legislative power to the President, in *Franklin T.P. in Somerset County, N.J.* v. *Tugwell,* 66 App. D.C. 42, 85 F. 2d 208 and that:

"In the present case the question of constitutionality can be determined from the face of the act. Consequently, no findings of fact could affect the proper determination of this question.

"The Court in the Schechter case, in discussing the limitations upon the power of the Congress to delegate legislative power, then said:

'But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry. * * *

'The act provides for the creation by the President of administrative agencies to assist

him, but the action or reports of such agencies, or of his other assistants—their recommendations and findings in relation to the making of codes—have no sanction beyond the will of the President, who may accept, modify, or reject them as he pleases. * * *

'Section 3 of the Recovery Act (15 U.S.C.A., Sec. 703) is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorized the making of codes to prescribe them. For that legislative undertaking section 3 sets up no standards aside from the statement of the general aims of rehabilitation, correction and expansion described in section 1. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power.'

"Turning now to the Emergency Relief Appropriation Act of 1935, and examining it in the light of the principles laid down in the decisions in the Panama and Schechter cases, it appears that, insofar as this case is concerned, there is a clearly unconstitutional delegation of legislative power."

—at p. 218.

The failure of the President to define the standards under which punishments are to be imposed upon violators of ordinances and other enactments promulgated

by others than the President, and the failure of the President to make such enactments criminal, if the failure of the President to make such enactments criminal, if the President has such power, which is denied, renders Executive Order No. 10,713 invalid as an unconstitutional attempt to delegate legislative power.

II. PETITIONER WAS ENTITLED TO THE PROTECTION OF THE CONSTITUTION, AND PARTICULARLY ARTICLE III AND THE FIFTH AND SIXTH AMENDMENTS THEREOF.

A. The Constitution Applies to the United States Civil Administration Court

Assuming, for the purpose of argument only, that the Ryukyuan Court is legally established, it must be conceded that it is a creation of the United States and such power and jurisdiction as it has must stem from and, at the same time, must be limited by the Constitution of the United States. It was not established under Article III, Section 1 of the Constitution, reading in part as follows:

> "SECTION 1. The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts *as the Congress* may from time ordain and establish." (Emphasis supplied.)

Congress did not establish this Ryukyuan Court.

Assuming, *arguendo,* that the President had the authority to create this Ryukyuan Court through Respondent, the Secretary of Defense, and the High Commissioner, such power and authority as that Court has must be derived solely from the powers of the President and, therefore, must be limited by the Constitutional authority and powers reposing in the President.

In *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 57 S. Ct. 216 (1936), the defendant was indicted on a charge of conspiring to sell in the United States machine guns to Bolivia, in violation of a Joint Resolution of *Congress* and the provisions of a proclamation *issued* pursuant thereto by the President.

This Court sustained the President's proclamation, but noted:

> "It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of *legislative power,* but with such an authority plus the very delicate, plenary and *exclusive power of the President as the sole organ of the Federal government in the field of international relations—a power* which does not require as a basis for its exercise an act of Congress, but which, of course, *like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.*" (Emphasis supplied.)
>
> —at pp. 319, 320; 221.

The two bases urged below concerning our contention that Petitioner is entitled to the protection of Article III of the Constitution and the Fifth and Sixth Amendments are:

(1) The acts or omissions giving rise to the charges were committed outside the United States in *enemy occupied* territory, or

(2) The case arose from the President's powers over the land or naval forces or "the militia when in actual service in time of war or public danger."

Neither of these arguments are of any avail here. The United States was the plaintiff in the USCAR Court;

the Court is The UNITED STATES Civil Administration Superior Court; and the Ordinances were issued by a United States Army Officer under delegated authority of the President.

Any attempt to rely on the "insular cases" (*Balzac* v. *People of Puerto Rico,* 285 U.S. 298, 42 S. Ct. 343 (1922); *Pugh* v. *U. S.,* 212 F. 2d 761, C.A. 9 (1953), and *Hatchett* v. *Federal Government,* 212 F. 2d 767) is equally misplaced. Judge Gasch so held in the instant case, *Rose* v. *McNamara,* 252 F. Supp. 111, 113.

First of all, the defendants in the "insular cases" were *not* American citizens. Secondly, the Supreme Court in the *Covert* case, involving American citizens, expressly held:

> "The 'insular cases' can be distinguished from the present cases in that they involved the power of Congress to provide rules and regulations to govern temporary territories with wholly dissimilar traditions and institutions whereas here the basis for governmental power is American citizenship."
>
> —*Reid* v. *Covert,* supra, at p. 1229

Furthermore, Okinawa cannot be considered as "*enemy occupied*" land or "territory" within Article IV, Section 3, Clause 2 of the Constitution, because the island is not "occupied", it has been transferred to the United States. Congress has not acted with regard to it and it is not Congress' power with which we are now concerned.

This Court's attention is called to the fact that the United States District Court for the District of Columbia upheld the arrest and extradition of a United States citizen on a fugitive warrant for removal to the

continental United States, on the theory that Okinawa was within the special maritime and territorial jurisdiction of the United States as such is defined in Title 18, U.S.C., Sec. 7, a position which was strongly and successfully urged by defendant's predecessor in that Court. And that Court (Judge Edward M. Curran) in *Hitt* v. *McElroy,* Habeas Corpus No. 40-58, so held.

Thus, the Government having urged that Okinawa is within the jurisdiction of the United States and that the District Court below must issue a fugitive complaint, which that Court did, it is somewhat futile to urge that the Ryukyuan Islands are, and persuade the Court below to hold that they are "foreign occupied lands" in which the rights of American citizens are not protected by the Constitution and where United States officials under the direction, supervision and control of the President may, with impunity, disregard the most fundamental safeguards that the Constitution provides for American citizens.

B. Petitioner Was Entitled to the Protection of the Fifth and Sixth Amendments

It is clear that this case is not within the power of the President over the land or naval forces to act in time of war or public danger. And, since Petitioner is a civilian, there appear to be no grounds whatever by which Article III and the Fifth and Sixth Amendments should suddenly have become inoperative with regard to her.

The Court below seems to have held that this United States CIVIL Administration Court is a Military Court, being established by the High Commissioner (a General of the United States Army) under the authority of the Secretary of Defense; or that the USCAR Court

acts somewhat like a Consular Court in a foreign territory, and therefore it is not bound by the guaranties and protection that Article III and the Fifth and Sixth Amendments bestow upon American citizens.

None of these arguments avail here, since Petitioner is not a member of the Armed Forces, and is not subject to a Military Code of Justice and is protected by the Constitution.

As early as 1888, this Court held that it was the purpose of the Constitution to secure indictment by grand jury and trial by petit jury for United States citizens, even if the alleged crime was committed "out of any States". The crime occurred in the Districtof Columbia. This Court held in *Callan* v. *Wilson,* 127 U.S. 560, 3 S. Ct. 1201 (1888):

> "In the draft of a constitution reported by the committee of five on the 6th of August, 1787, in the convention which framed the constitution, the fourth section of article 11 read that 'the trial of all criminal offenses (except in cases of impeachment) shall be in the states where they shall be committed, and shall be by jury.' 1 Elliott, Deb. (2nd Ed.) 262."

But the article was, by unanimous vote, amended so as to read:

> "The trial of all crimes (except in cases of impeachment) shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, then the trial shall be at such place or places as the legislature may direct." Io. 300. The object of thus amending the section, Mr. Madison says, was "to provide for trial by jury of offenses committed out of any state." 3 Mad.

> Papers, 144. In *Reynolds* v. *U. S.*, 98 U.S. 154, it was taken for granted that the sixth amendment of the Constitution secured to the people of the territories the right of trial by jury in criminal prosecutions; and it had been previously held in *Webster* v. *Reid*, 11 How. 437, 460, that the seventh amendment secured to them a like right in civil actions at common law."
>
> —at p. 1304.

And, as this Court held:

> "Except in that class or grade of offenses called 'petty offenses', which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guaranty of an impartial jury to the accused in a criminal prosecution, conducted either in the name or by or under the authority of the United States, secured to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offense charged. In such cases, a judgment of conviction, not based upon a verdict of guilty by a jury, is void."
>
> —at p. 1307.

As recently as 1957, in *Reid* v. *Covert*, *supra*, this Court made it clear that the Constitution protects the citizens of the United States, whether they are *within* the United States or abroad. This Court held:

> "At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad,

the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land."

—at pp. 5-6; 1227.

Mr. Justice Frankfurter, concurring, held:

"Governmental action abroad is performed under both the authority and the restrictions of the Constitution—for example, proceedings before American military tribunals, whether in Great Britain or in the United States are subject to the applicable restrictions of the Constitution."

—at p. 56; 1251.

Mr. Justice Whittaker and Mr. Justice Stewart (neither participating in the *Covert* case) authoritatively stated the Rule of *Covert* in *McElroy* v. *United States,* 361 U.S. 234, 80 S. Ct. 331, to be:

"Our recent decision in Reid v. Covert . . . makes clear that *the United States Constitution extends beyond our territorial boundaries and reaches* to and applies within all foreign areas where jurisdiction is or may be exercised by the United States over its citizens—that *when the United States proceeds against its citizens abroad 'it can only act in accordance with all the limitations imposed by the Constitution'.*" [Emphasis supplied]

—at p. 317.

That Article III and the Fifth and Sixth Amendments were the real object of this Court's concern in *Covert* appears from the following language:

"Looming far above all other deficiencies of the military trial, of course, is the absence of trial by

jury before an *independent judge* after an indictment by a grand jury." [Emphasis ours].

—at p. 37; 1241.

Covert expressly overruled the 1891 concept of *Ross* v. *McIntyre,* 140 U.S. 453; 11 S. Ct. 897 (1891) which upheld the powers of Consular courts. Mr. Justice Black wrote:

"The Ross case is one of those cases that cannot be understood except in its peculiar setting; even then, it seems highly unlikely that a similar result would be reached today.

* * * * *

The Ross approach that the Constitution has no applicability abroad has long since been directly repudiated by numerous cases. That approach is obviously erroneous if the United States Government, which has no power except that granted by the Constitution, can and does try citizens for crimes committed abroad. Thus the Ross case rested, at least in substantial part, on a fundamental misconception and the most that can be said in support of the result reached there is that the consular court jurisdiction had a long history antedating the adoption of the Constitution. The Congress has recently buried the consular system of trying Americans. We are not willing to jeopardize the lives and liberties of Americans by disinterring it. At best, the Ross case should be left as a relic from a different era."

—at pp. 10, 12; 1227, 1228.

Covert concerned a capital offense. *Kinsella* v. *Singleton,* 361 U.S. 234, 80 S. Ct. 297 (1960), presented the question whether *Congress* could constitutionally authorize trial by court-martial of civilian de-

pendents for non-capital offenses committed overseas in peacetime. This Court held that it could not.

Grisham v. *Hagan,* 361 U.S. 278, 80 S. Ct. 310 (1960), presented the question whether *Congress* could constitutionally authorize trial by court-martial for a capital crime allegedly committed by a civilian employed overseas in peacetime by the United States Army. This Court held it could not.

In *McElroy* v. *United States,* 361 U.S. 234, 80 S. Ct. 311 (1960), this Court held that *Congress* could not constitutionally authorize trial by court-martial for a non-capital crime committed by a civilian employed overseas by the Armed Forces in peacetime. Following the rationale of *Covert, Grisham* and *Singleton,* this Court held:

> "The recognized authority on court-martial jurisdiction, after a careful consideration of all the historical background, concluded: 'That a civilian, entitled as he is, by Article VI of the Amendments to the Constitution, to trial by jury, cannot legally be made liable to the military law and jurisdiction, in time of peace, is a fundamental principle of our public law . . .'"
>
> —at p. 308, quoted from Winthrop, Military Law and Precedents (2d Ed. 1896) 143.

Covert, McElroy, Grisham and *Singleton*—all are cases arising before a Court that was established by Congress, under the Uniform Code of Military Justice, duly adopted by Congress. The cases all involved defendants whose activities and occupations were closely bound up with the Military and its activities in foreign lands. This Court held that the Constitution including the Bill of Rights completely protected and applied

to these defendants; that they were entitled to prosecution in an Article III Court by grand jury indictment and to trial by jury.

In the case at bar, the United States Civil Administration Court was established by the President. The criminal laws involved were promulgated by authority which was (we say, invalidly) delegated by the President. Complainant, Investigator, Prosecutor, Law, Procedure, and Appellate Court—all were established and controlled by the same (one man's) authority. Petitioner is an American citizen, and a civilian. She was not employed by the Army. If this Court struck down the Military's power to try *Covert* and *Singleton* without a jury, *a fortiori,* Petitioner could not be tried legally with disregard of Article III and the Fifth and Sixth Amendments. What this Court said in *Covert* (where Congress, at least, had written the law), applies to this case:

> "If the President can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials. Such blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers."
>
> —*Reid* v. *Covert,* supra, at p. 1242.

The United States District Court for the District of Columbia followed the mandate of this Court in *Covert, McElroy, Grisham* and *Singleton* in its decisions in *Ikeda* and *Nicholson,* supra. The Court below did not.

The decision below conflicts with *United States* v *Mason,* 344 F.2d 673, (CCA 2, 1965). *Mason* involved a Treaty with Spain. In *Mason,* an alleged deserter

from a Spanish warship was arrested and ordered deported by the United States in New York pursuant to the 1903 Treaty with Spain respecting deserting seamen. The seaman was arrested without a warrant by United States naval officers who assumed the responsibility of determining whether the treaty applied and of returning the seaman to the Spanish authorities. Judge Thurgood Marshall of the Second Circuit Court of Appeals in a learned opinion, reviewed the constitutional problems involved and stated that authority to enforce the treaty must be conferred by law and is not to be inferred even though it was natural for the Navy to attempt to enforce the treaty under the circumstances as it involved an admitted deserter from the Spanish Navy. In holding that the Navy's detention of the seaman was unlawful, and in reversing the District Court's dismissal of the Petition for a Writ of Habeas Corpus (reported in 232 F. Supp. 102) Judge Marshall held:

> "But more fundamentally, even it an individual admitted all the facts required by the Treaty, and no legal issues were present in determining whether the Treaty was operative, this would not clothe the INS or the Navy with legal competence to execute the Treaty by arresting and imprisoning the individual. The constitutional guarantee of due process of law requires that all coercive action of federal officials be authorized in law, and this authority cannot be stitched out of an individual's admission of certain facts that would, according to a treaty, entitle "competent national or local authorities" to take such action. Competence to enforce that treaty must be conferred on the federal officials by law, and no such competence has been conferred on either the INS or Navy."
>
> —at pp. 681, 682.

III. THE PETIT JURY WAS NOT MADE UP ENTIRELY OF AMERICAN CITIZENS AS REQUIRED BY LAW

The petit jury in the case below included among its members three Filipinos, one Korean, one Chinese and one Ryukyuan citizen. (App. "C", infra p.)[3] Change Order 19, adopted 8 March, 1963, amending C.A. Ordinance No. 144, emanating from the High Commissioner, a United States General, authorized in the USCAR Court indictment and trial by jury out of concern for the rulings in *Nicholson* and *Ikeda*. Neither this Order nor the Rules of Criminal Procedure enacted by the USCAR Court require that petit jurors be United States citizens. Such a jury, on which six foreigners sat as jurors, is contrary to law. USCA, Title 28, Sec. 1861 requires that Federal jurors be comprised only of citizens of the United States. Petitioner was denied, as a United States citizen, a trial by a jury of her peers, i.e., United States citizens, as six of the jurors were foreigners. The presiding judge was not a judge appointed by the President and confirmed by the Senate, but was an Army employee, as are the appellate judges who at times also sit as trial judges in the USCAR Court. Such a trial court and jury do not meet the constitutional requirements of Article III and the Fifth and Sixth Amendments. Certainly such judges are not *independent* judges and certainly are not Article III judges or legislative judges. They were not au-

---

[3] The taxes claimed have been paid by the actual operator of the Tea House, August Moon and Respondent is trying to refund these taxes in order to maintain Petitioner's conviction! (App. "C", p. 46a-47a)

thorized by law or assignment to preside over a felony trial in a United States Court of an American citizen.

In the case below, the United States of America was the plaintiff; the United States claimed a military ordinance had been violated, and the trial was held in a United States Court; a criminal penalty for the violation of this ordinance was imposed on an American citizen in this Federal Court acting under delegated authority from the President of the United States. The Court below brushed aside our contention that Congress requires that all Federal jurors be citizens of the United States, as provided for in 28 U.S.C., Sec. 1861 (1964), on the theory that this statute relates only to United States District Courts. We do not so read the statute. The statute provides for "qualifications" of *Federal* jurors and restricts *Federal* jurors to "citizens of the United States."

We submit the petit jury which convicted Petitioner, admittedly being not made up exclusively of citizens of the United States, was illegally constituted, which renders the verdict of that jury void.

The argument of the Court below (footnote 4) that the offense involved was not one against the United States, is specious and untenable, and a reading of the indictment in this case will demonstrate that the "crime" here involved is against the United States.

The decision below conflicts with *Ex Parte White,* 66 F. Supp. 982 (D.C., Hawaii, 1944). In *White,* during the course of the second World War and after the battle of Midway, an invasion of Hawaii was feared. The Governor of Hawaii delegated to the Commanding General all of his authority. The Military Governor proceeded to try an American in a Pro-

vost Court, contrary to constitutional rights conferred by the Fifth and Sixth Amendments, including (among other things) a denial of a right to trial by jury in a court presided over by a United States Judge. The District Court held that the trial of White in a Provost Court under orders of the Military Governor of Hawaii, issued in time of war under authority of the President, deprived White of his constitutional rights under the Fifth and Sixth Amendments. The Court further held that the giving of a military trial to White was not justified; and the Provost Court could not deny him his constitutional rights as guaranteed by the Fifth and Sixth Amendments, including a trial by jury. Accordingly, the District Court granted a Petition for a Writ of Habeas Corpus and ordered White discharged from the custody of the Military Governor and his bond discharged. The District Court, in discharging White from the Military Governor's custody, held:

> The question of White's guilt or innocence of the charge is not involved in this case.
>
> It is incumbent upon courts, especially United States Courts—"* * * in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, * * *"
>
> War does not suspend the Constitution, or any part of it. It is the supreme law of the land at all times. Neither generals, governors, nor courts are exempt from its provisions at any time. The Federal Government's power to wage war and to wage it successfully involves to be sure the rule that in wartime individual rights must yield in the face of necessity—and to the extent necessary—to the nation's innate and paramount power of self preservation.

That White may be guilty of violating the Territorial statute defining the offense of embezzlement and prescribing the penalty therefor or that military courts mete out military justice at an accelerated pace, unhampered by the Bill of Rights, are not reasons for ignoring the mandates of the Fifth and Sixth Amendments.

"Constitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty."

"Military jurisdiction over a civilian unconnected with the armed forces must even during war be justified in point of law. What then is the justification for denying to White his constitutional rights?

Upon the record—and it permits of no equivocation—the assigned reason is that the Governor of Hawaii delegated to the General all of the "powers normally exercised by the judicial officers" of the Territory, which powers the General exercised in the White case under the name and style of "Military Governor of Hawaii."

Of course Hawaii has never lawfully had either a military government or a "Military Governor," even though it has had both in fact. Such a government and title are lawful only with respect to conquered foreign territory. Lacking the factual basis in Hawaii, United States of America, there is nothing then in the erroneously used title of "Military Governor" which lends support to the situation in the White case. The tinsel of the title here tends to obscure by justifiable American irritation the real question.

The precise and only question is, did the Governor of Hawaii have any judicial power to delegate? If not, the General's acts in reliance thereon were null and void and effected in the White

case a denial of his rights under the Fifth and Sixth Amendments. Inferred Presidential approval would avail naught."

—at pp. 986-987.

CONCLUSION

For the reasons stated in this Petition, Petitioner prays that a Writ of Certiorari issue to review the erroneous judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

WARREN E. MAGEE,
HANS A. NATHAN,
1730 K. St., N.W.
Washington, D. C. 20006

WILLIAM H. QUASHA,
P.O. Box 3372
Manila, Philippines

Attorneys for Petitioner

Of Counsel:

HOWARD B. MCCLELLAN,
Naha, Okinawa

STUART H. ROBESON
and
ROGER E. BROOKS,
1828 Jefferson Place, N.W.
Washington, D. C.

Dated: June 20, 1967